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IN THE

Supreme Court of the United States

October Term, 1954

No. 749

HENRY HEIDE, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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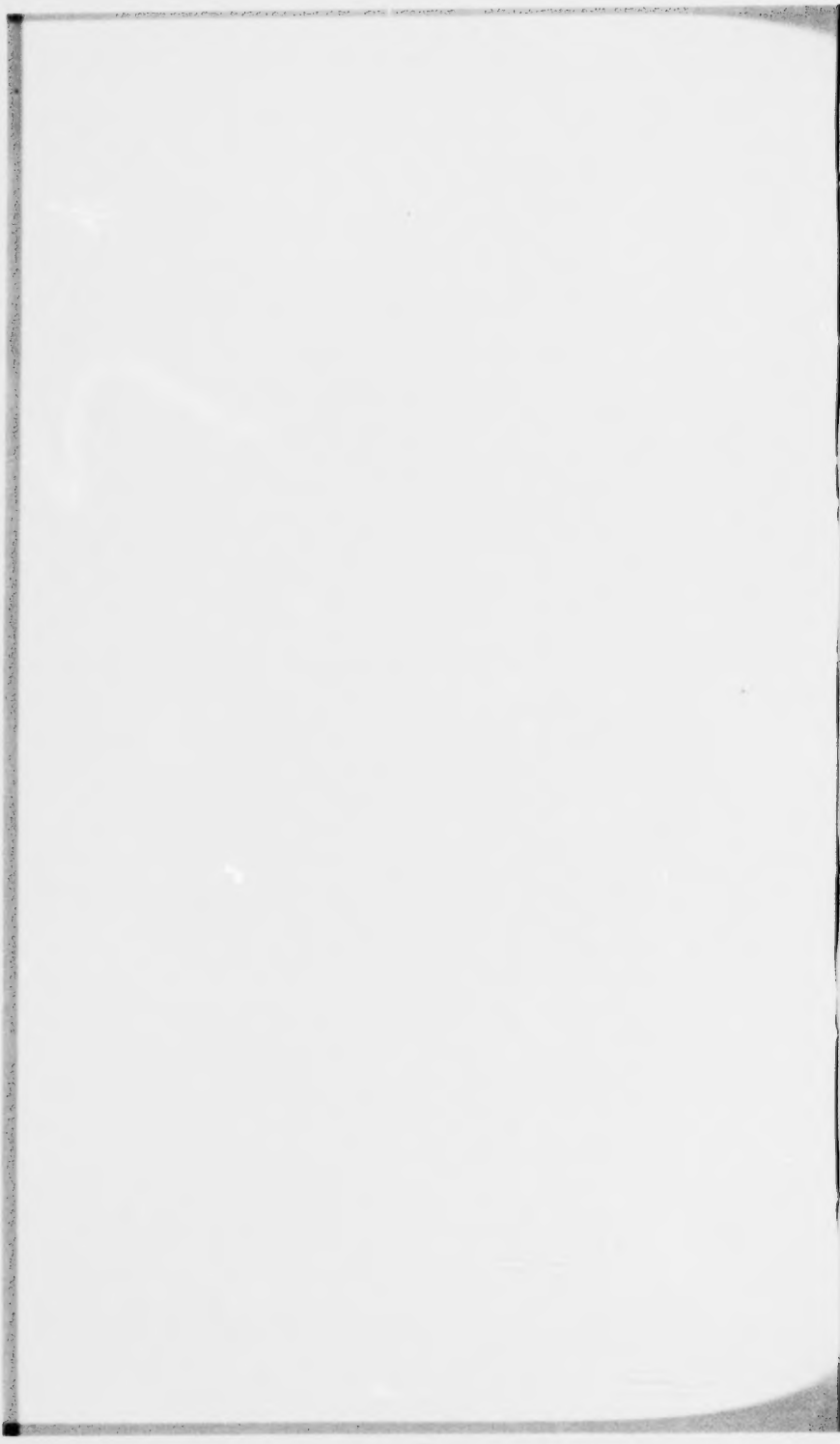

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit entered in the above entitled case pursuant to its decision dated the 19th day of January, 1955.

Citations to Opinions Below

Respondent's Decision and Order are reported in 107 N. L. R. B. No. 258. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, *infra*, page 21, is reported in 219 F. 2nd 46.

Jurisdiction

The decree of the Court of Appeals was entered on February 11, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

1. Where an employer, a rival union and a majority of the employees, by representation petitions, allege "unusual circumstances" as justifying a new election within the certification year but after the election year, may Respondent, without investigation or hearing, disregard such petition "as a matter of policy" and dismiss the petitions as "filed prematurely in relation to the certification year" in disregard of Section 9(c)(1) of the Act?

2. Did the Court below misapply the holdings of this Court in: *Brooks* v. *N. L. R. B.*, 348 U. S. 96, *N. L. R. B.* v. *Mexia Textile Mills*, 339 U. S. 563, and *Franks Brothers Co.* v. *N. L. R. B.*, 321 U. S. 702?

3. Is the holding below in conflict with the holding of the United States Court of Appeals for the Third Circuit in *N. L. R. B.* v. *Globe Automatic Sprinkler Co.*, 199 F. 2nd 64?

4. Does the mere fact that Petitioner, in an effort to be a neutral employer *vis-à-vis* two rival unions, suspended negotiations with the certified union during pendency of representation petitions and appeals constitute, as a matter of law, violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended?

5. May Respondent, in a case where it delays certification for five months after election, disregard the election year rule (Sect. 9(c)(3) of the Act) and insist on a "certification year rule" in violation of the mandate of Section 9(c)(1) of the Act?

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6. Where the actual good faith of Petitioner during collective bargaining with the certified union was never an issue before the Trial Examiner nor by filed Exceptions (Sect. 10(c) of the Act), may that issue be raised, consistently with due process of law, for the first time by Respondent's Decision and Order, and then by the Court below on Respondent's argument?

Statute Involved

The statutory provisions involved are Sections 8(a)(1), (2), (3) and (5) and 8(c), 8(d), 9(c), 10(c) and 10(e) of the National Labor Relations Act, as amended (61 Stat. 136); as well as Rules and Regulations of the National Labor Relations Board, Section 102.46, subdivision (b). They are printed in Appendix B, *infra*, page 36.

Statement

In November, 1945, Candy & Confectionery Union Local 50, CIO, was certified by Respondent as exclusive representative of Petitioner's factory employees. Six years of good labor relations (24a)* and a series of labor agreements followed. The last contract executed July, 1950, by its terms expired May 15th, 1951. In February, 1951, Local 50 proposed negotiations for a new contract. But on April 12, 1951, before agreement was reached, Candy & Confectionery Workers Union, Local 452, AFL, filed a representation petition. The Board conducted an election May 17th, 1951; Local 50 won by 39 votes; 381 workers being eligible to vote (36). *Local 452, by post-election objections, charged Petitioner with favoritism toward Local 50.* On October 9th, Respondent dismissed objections and certified Local 50.

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* Figures in parentheses followed by the letter "a" refer to page numbers of Appendix to Brief of Respondent in the Court below; figures in parentheses alone refer to page numbers of Appendix to Brief of Petitioner in the Court below.

Meanwhile, on September 19th, Local 50 had struck Petitioner on the disciplinary suspension of an employee (3a-8a). Petitioner offered to arbitrate the suspension pursuant to an arbitration agreement with Local 50 (5a, 7a, 63a, 76a, 86a, 92a; General Counsel's Exhibits 29 and 79). Local 50 refused. The strike lasted 16 weeks, causing loss of Petitioner's Christmas trade. During the strike most of the employees refused to go through the picket line. A strike settlement agreement (18a *ff.*), concluded on January 3, 1952, through the *mediation* * of Father Philip J. Carey, S. J., permitted new employees, hired and working during the strike, to be retained in the bargaining unit. It called for maintenance of membership (instead of union shop), and the precise wage increase first offered by Petitioner shortly after certification. The Union had lost the strike.

After certification and prior to the strike's end, Petitioner's representatives met with those of Local 50 on *eight* occasions in unsuccessful efforts to conclude a new agreement. After the strike, the parties bargained collectively on February 8 and February 13, 1952. On February 15, Local 452, by telegram (23), claimed majority status and demanded recognition. (Respondent alleges no unfair labor practice prior to February 15, 1952.)

As stated above, Local 452 less than ten months previously had charged Petitioner with favoritism toward Local 50. True, the Board had dismissed the charge after five months of deliberation. Now, with that charge in the background, Petitioner was faced with claim of majority status and demand for recognition by Local 452. Rather than decide at its peril which local represented its employees, Petitioner on February 19, 1952 filed an election petition setting forth the history of the case up to that date

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* The decision appealed from erroneously suggests *arbitration* and erroneously fixes date of strike settlement on January *31* (instead of January 3).

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and alleging Petitioner's well-founded doubt that Local 50 represented a majority of the employees. By coincidence, Local 452 filed its petition for election on the same date. In the light of the immediate background of charge, countercharge, recrimination, strike and consequent antagonism between the unions, no inference of collusion between Petitioner and the uncertified union was possible. Nor was there any charge (176a) or evidence of collusion.

Both petitions sought election *after the election year.* During pendency of the election petitions and appeals Petitioner suspended (27a) bargaining in an effort to maintain neutrality. But during such time Petitioner did meet with Local 50 many times to settle grievances by discussion and arbitration (86a). On March 6th, the Regional Director dismissed both election petitions because "they were filed prematurely in relation to the certification year" (46). On April 2nd, Respondent sustained the Regional Director's ruling.

Petitioner and Local 50 attended another bargaining session April 8th, 1952. It, too, ended in impasse on union security, contract duration and wage increase. The parties had agreed, by this time, upon incorporation in the proposed contract of most of the provisions of the old. After April 8th, 1952, Petitioner, first learning that on April 4th, 1952, employees had filed a decertification petition, again suspended negotiation with Local 50 until that petition and the appeal therefrom were dismissed by Respondent on May 14th, 1952. Thereafter there were collective bargaining meetings on May 28th, August 1st, and August 28th. All ended in stalemate.

On expiration of the certification year and after the filing (on September 11th, 1952) by Local 452 of another quickly-dismissed representation petition, Petitioner terminated relationship with Local 50 by a letter (October 16,

1952) giving reasons for its action (General Counsel's Exhibit 79).

Ever since February 19th, 1952, Petitioner had sought to persuade both unions, in the cross-fire of whose rivalry it and its employees had been constantly harassed, to submit to a new election (88). It urged that changed and unusual circumstances warranted election within the certification year but after the election year. Neither Respondent nor Local 50 would consent to a new election. After the certification year and because Respondent without investigation had automatically dismissed all election petitions, Petitioner invited the rival unions to participate in a show of cards conducted under fair rules (94) by an impartial third party (88, 39a). The latter, having conducted an examination of cards on December 10th, 1952, certified that Local 452 had exhibited 216 applications out of a possible 361 (99). Petitioner then recognized Local 452; conducted negotiations with it; and on January 7th, 1953, concluded a labor contract with it.

Local 50 admitted (100a-101a) before the Trial Examiner that Petitioner at no time refused, upon the certified union's request, to bargain with it except during the pendency of the election petitions and appeals. Even during such pendency, Petitioner did meet with the certified union to process grievances (63a, 86a, 92a, 93a).

Petitioner's 15 reasons for claiming "unusual circumstances" to warrant an election during the certification year but after the election year had been carefully set forth in its representation petition (Case No. 2-RM-394) and appeal (40a-52a *ff.*). Respondent did not investigate these reasons; nor submit them to hearing; nor address itself to them in dismissing the representation petitions.

Eventually, Petitioner was charged under two complaints with unfair labor practices. The very filing, by Petitioner, of its representation petition was urged as an

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unfair labor practice. The Intermediate Report of the Trial Examiner (313 *ff.*) set forth the nine issues litigated before him. Neither the General Counsel nor Local 50 filed Exceptions to the Intermediate Report challenging the accuracy of the Trial Examiner's statement of the issues.

Reasons for Granting the Writ

1. The challenged decision (Appendix A, *infra*, p. 21 *ff.*) directly conflicts with *N. L. R. B.* v. *Globe Automatic Sprinkler Co.*, 199 F. 2nd 64 (3rd Circuit) (Appendix C, *infra*, p. 45 *ff.*). The issue there was "whether the Board properly determined that Globe violated Section 8(a)(5) and (1) of the Act when, as a consequence of the filing of a decertification petition by an employee, it suspended negotiations with the Union three weeks prior to the expiration of the year following its certification as statutory bargaining representative * * *". The Third Circuit answered this question negatively; whereas here the Second Circuit answered a similar question affirmatively.

2. The Court below misapplied holdings by this Court in: (a) *Brooks* v. *N. L. R. B.*, 348 U. S. 96, by deeming it relevant; (b) *N. L. R. B.* v. *Mexia Textile Mills*, 339 U. S. 563, by disregarding the rival union's authority to raise the question of "diminution in membership in the certified union"; and (c) *Franks Brothers Co.* v. *N. L. R. B.*, 321 U. S. 702, by neglecting one of its standards for determining a "reasonable" period of certification.

(a) In the *Brooks* case, the employer, without alleging or showing unusual circumstances, refused to bargain with a certified union solely because, seven days after the union had won a Board election, the employer received a paper, ostensibly signed by a majority of his employees, disavowing the certified union. In the instant case, Petitioner urged

fifteen grounds (only one of which was loss of majority) constituting "unusual circumstances" warranting an election as permitted by Section 9(c)(1) but during the certification year (50a *ff.*). Respondent never investigated these grounds. It did not give Petitioner a hearing respecting them. The representation petitions were dismissed solely because they were premature in relation to the end of the certification year (46). In the *Brooks* case, this Court said that: "An employer, if * * * beset by the conflicting claims of rival unions could * * * petition the board for an election" under Section 9(c)(1)(B). In the instant case, Petitioner though beset by such conflicting claims, was arbitrarily denied the statutory right to a new election. This is no case of employer self-help. The employer sought the Board's help and was arbitrarily refused such help. Besides, Petitioner as employer had no "doubts" about its duty to bargain with the certified union during the pendency of the election petitions. The "doubts" dictum in the *Brooks* case (Appendix A, p. 24) has no relevance here.

(b) In the *Mexia* case, this Court said: "To authorize the employer to assert diminution in membership in the certified union in an enforcement proceeding subverts this statutory mandate (Sect. 9(c)(1) of the Act). The authority to raise the question is vested exclusively in rival unions * * *". When the rival union here sought to raise this question by election petition, the Board arbitrarily rejected the petition without investigation or hearing. Section 9(c) of the Act states that a "group of employees" may "assert that the * * * labor organization which has been certified * * * is no longer a representative". In the instant case, *not only did a rival union assert diminution in membership in the certified union but the majority of the employees signed and filed a decertification petition.* All such petitions were rejected without investigation or hearing by Respondent which almost two years later proceeded (in spite of the evidence in such petitions) to hold that

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there was no evidence of loss of majority status by the certified union (259). The Trial Examiner had excluded evidence on this point (103a *ff.*, 116a, 143a *ff.*). Respondent refused to investigate the matter. Its trial attorney, on the record, admitted that he did not know which union had the majority (105a).

(c) In the *Franks* case, this Court said: "For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop." The decision below, for all practical purposes, fixed a permanent bargaining relationship without regard to circumstances and new situations, such as "enormous" (51a-52a) turn-over which the Board did not even investigate.

3. Section 9(c)(1) of the Act provides that the Board "*shall* investigate" petitions filed by an "employer", by an "employee" or by a "group of employees". (emphasis supplied) The Board made no investigation whatever in the present case. It followed a policy which made superfluous investigation of anything but the calendar (137a). It simply dismissed the petitions because they were filed within the certification year, even though they asked for election after the election year (46).

Moreover, the employer and employee petitions presented "reasonable cause to believe that a question of representation" existed. The union and employee petitions were accompanied by the signatures of the vast majority of the employees in the unit. The employer petition was accompanied by an affidavit setting forth information (which was not even investigated by a Field Examiner) showing loss of majority status (44a *ff.*). Under such circumstances, the statute requires that the Board "*shall* provide for an appropriate hearing upon due notice". (emphasis supplied) The Board failed so to provide. It did not notice a hearing nor conduct one. The

Board had one routine formula (131a) only for all representation petitions filed within the certification year: because they were filed in the certification year they were to be dismissed, despite the fact that they called for election after the election year (Sect. 9(c)(3) of the Act) (52aa).

The same treatment was accorded the *Employer petition* in Case No. 2-RM-394, filed February 19, 1952; the *Union petition* in Case No. 2-RC-411, filed February 19, 1952; the *Decertification petition* filed April 4, 1952 in Case No. 2-RD-155. The second *Union petition* filed September 11, 1952, Case No. 2-RC-5146, which was dismissed because of the issuance of the first complaint (General Counsel's Exhibit 81).

4. The question presented is of major importance in the administration of the Act. Employers and labor unions should know whether a "reasonable" time depends on the circumstances; whether one of two rival unions may maintain a monopoly for four years in defiance of the wishes of employees; whether slogans like "reasonable time", "special circumstances", "ordinary case", "normally one year" and "unusual circumstances" mean what their English suggests. See *Livingstone Shirt Corporation*, 107 N. L. R. B. No. 109, where the Board wrote: " * * * the Act does not require the employer, *absent unusual circumstances*, to accede to such a union request" [to address employees on company property and time].

5. The "*certification year* rule" is an invention of the Board. The "*election year* rule" was defined by Congress (Sect. 9(c)(3)). There is no substantial time difference between the two rules in the "ordinary" case. Here the difference amounted to five months. The Board took that time to dismiss post-election objections. The Court below implies that the "unusual circumstances" rule is no longer effective (Appendix A, p. 24). Is this now the law? In the *Brooks* case, Respondent and this Court appealed to the

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"unusual circumstances" rule. Is that rule now a fraud or a trap even for the wary? The alleged purpose of the "certification year rule" is to provide an established bargaining relationship with "reasonable" stability.

In the cross-fire of two rival unions, no "reasonable" stability is possible. It is not reasonable constantly to announce a Board rule of "unusual circumstances", of "reasonable time" and of "ordinary" application and then to punish those who take that rule seriously and who try to apply it consistently and neutrally. The Act expressly aims at "full freedom of association, self-organization, and designation of representatives *of their own choosing*, for the purpose of negotiating the terms and conditions of their employment * * * ". (emphasis supplied) In the instant case that legislative purpose has been unhonored for almost four years. Stability, as an *implied* objective of the Act, is not being served by stubborn and undiscriminating application of the one year "certification rule". On the basis of the decisions, no one can now distinguish "ordinary" from "unusual" cases. "The power granted to the Board is remedial not punitive" (*N. L. R. B.* v. *Flotill Products, Inc.*, 180 F. 2nd 441). The remedial effect of disciplining the employer here would be slight as compared with the blatant denial of employees' free choice involved in Respondent's arbitrary dismissal of one employer election petition, two union representation petitions and one decertification petition.

Here there are: (a) a background of good relations for seven years; (b) certification five months after the last election; (c) loss by certified union of majority status four months after certification and nine months after election; (d) long-standing bitterness between certified union and its ballot rival, with which the certified union had been twice affiliated and from which it had twice seceded; (e) a sixteen-week strike (as to which certified union violated its agreement to go to arbitration as offered by Petitioner) lost by the certified union, with attendant, inevitable dis-

satisfaction of the employees involved; (f) certification based upon an election whose outcome would have been changed by twenty voters (out of 381) voting the other way; (g) no charge or evidence of collusion between employer and the rival union; (h) "enormous" turnover of employees in the bargaining unit, due to strike and persistent warring of two unions; (i) inability of the certified union, after the strike, to present more than 66 valid check-off cards out of about 381; (j) demand by the certified union for a long-term contract to perpetuate its monopoly without majority status; (k) constant rejection by certified union of the proposal that the dispute into which employer and employees were involuntarily drawn be settled by a new election one year after the earlier election; and other circumstances culminating in the outstanding fact that the employees in the unit have not had an opportunity, by election, to choose their representative during the past four years.

(6) Correction of the Court below has immediate importance far beyond the particular facts and parties because the new Board rule accomplishes two unconstitutional and unstatutory results:

(a) Respondent completely ignored, *at the time,* Petitioner's allegations of "unusual circumstances". The Court below said: "The Board has found * * * that no unusual circumstances exist * * * " (Appendix A. p. 25). The Board did no such thing in response to the employer petition filed February 19, 1952, alleging "unusual circumstances". It neither investigated, nor passed on those allegations at the time they were made. Non-responsively it ruled that those allegations had been made during the certification year—as anyone who could read a calendar would know (46). Then, about two years later, Respondent held (*ad hoc* and for the first time in its history) that an employer's obligation to bargain with the certified union continues until a Board notice of hearing shows that

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Respondent thinks that the allegations of "unusual circumstances" warrant investigation! (259) A petitioner alleging unusual circumstances would have to wait until the Board decided—by what standards no one knows—that an investigation *required by Section 9(c)(1)* was warranted. In effect, Respondent tells employers and rival unions that they may not consult their own attorneys or even the statute. They must come to the Board (which means to its Regional offices) for legal advice! Only when the Board's local personnel, at its whim, indicates by notice of hearing that the circumstances warrant a formal investigation, may an employer act consistently with contentions made by it in accordance with Section 9(c)(1), in good faith, on substantial grounds and with the advice of counsel. At its own option only, the Board provides investigation despite the statute's mandate. Far from applying this new rule when Petitioner filed its petition, Respondent paid no attention whatever to the circumstances therein set forth. It denied the petition solely because it was "filed prematurely in relation to the certification year" (46). Nothing could have been more irrelevant nor more arbitrary. The whole purpose of the "unusual circumstances" rule is to bring up the question of a new election before the certification year and after the election year has expired. Yet when the Trial Examiner asked why the election petitions were dismissed, Board Counsel said:

> "The reason was based on the Board doctrine * * *. The theory is, representation petitions filed during the certification year are groundless, untimely, and subject to immediate dismissal. It is the Board's policy" (137a). See also 131a for Board Counsel's statement of "conclusive presumption of majority status".

(b) The new rule (here conveniently adopted by the Board two years after Petitioner's representation petition

had been filed and non-responsively acted upon) itself supplies, on analysis, reasons why it should be declared invalid (46, 259). It tells an employer, who alleges "unusual circumstances", warranting an election during the certification year but after the election year, that he may not litigate them. He must, unless he receives notice of hearing indicating that the Board's regional personnel deigns to conclude that the circumstances warrant investigation, negotiate with a collective bargaining agent repudiated by his employees under unusual circumstances indicating that the certification has already lasted a "reasonable" period. For example, an employer is asked to negotiate contract-duration with a bargaining agent which, precisely because it has been repudiated by a majority of the workers, now insists on a long-term contract in order to maintain a monopoly endangered by election. If Jones is in genuine doubt whether Smith is agent for General Motors, the question of the agent's credentials must first be cleared up. The rule challenged here tells Jones to negotiate with Smith *in good faith* regardless of the question of authorization and in spite of evidence of non-authorization. This is a psychologically impossible and intolerable burden on good faith bargaining as defined by the Act (Sect. 8(d)).

7. Instances where rival unions vie for the allegiance of workers in a single bargaining unit are common in labor relations. There can be no real stability in a bargaining unit which, for more than four years without an election, has been harassed by the conflicting claims of two opposed unions. There is only one way to settle such claims. It cannot be by collective bargaining; nor by the techniques of mediators or experts; nor by litigation; nor by *ad hoc* administrative regulation. The only way that peace and stability can be served in the instant case is by a fair and impartial election (to protect workers and not just labor leaders) such as Local 50 has always been afraid of and such as Local 452 has sought since February 19, 1952. The

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correction which Petitioner seeks is a needed and logical corollary to and completion of the rule laid down in the *Brooks* case.

8. The decision below is of immediate importance far beyond the particular facts and parties and it presents a novel, unsettled and significant issue because it entirely disregards the definition of collective bargaining given in Section 8(d) of the Act and because of the peculiar theory of bad faith in bargaining which it exemplifies. As the partial dissent of Judge Learned Hand indicates (Appendix A. p. 30): "It is not bad faith to be inflexible in asserting your doubts." Section 8(c) of the Act and the First Amendment to the United States Constitution confirm that. Nor should an employer be penalized with an unfair labor practice charge simply because, in the name of procedural and substantive due process, he petitions Respondent under Section 9(c)(1) of the Act and conducts himself consistently with his petition.

The majority opinion below uses the words "bad faith" as a kind of conjuror's circle to enclose an unconstitutional and unstatutory meaning. As appears from Appendix D, *infra*, page 58, Petitioner's actual bad faith was never an issue before the Trial Examiner, in the Intermediate Report or by Exceptions. Therefore, under Section 10(c) of the Act and Board Rule 102.46, subdivision (b), bad faith could not properly thereafter be urged. According to the Intermediate Report, the loss of majority support by the certified union resulted from the very filing by Employer of an election petition. In rejecting this, Respondent held for the first time that the act of suspending bargaining during the pendency of election petitions alleging "unusual circumstances" was the primary unfair labor practice. The Trial Examiner had held that mere filing of the petition provided the "context of unfair labor practice". The Board found that "context" (262; Appendix A p. 28) in the suspension of bargaining by the employer in its effort

to be impartial. Then, in a transparent attempt at converting a *law question* into a *fact question*, Respondent without any support from the Record generalized: "On the record as a whole we are convinced that Respondent, on and after February 19, 1952, had no intention of honoring Local 50's certification * * *."

Words like "good faith" and "bad faith" have a most critical bearing on the proper administration of the Act. They are slippery and ambiguous terms. This Court is now asked to perform a difficult and long-needed surgery to dissect actual bad faith from constructive bad faith. The whole theory of the original trial revolved around a *legal question of constructive* bad faith. A year later, Respondent (and still later the Court below) conjured up, for the first time, a factual question of actual bad faith. It is a denial of due process under the Fifth Amendment to try a person on one theory; and then on appeal to discard that theory and to adopt another.

There is no evidence in the Record which blemishes Petitioner's good-faith doubts as to the certified union's majority status. Cogent evidence of loss of that status appears in the record (46a, 50a *ff.*). On the trial, Board Counsel said: "* * * we make no contention as to the actual majority status. Actually we don't know" (105a) majority status didn't matter (131a). The Trial Examiner forbade evidence bearing upon majority status (143a, 103a-108a, 116a-117a). Yet Respondent "found" no evidence of loss of majority status! (259) Nor is there a shred of evidence that Petitioner was guilty of "illegal anti-union activity or other conduct * * * aimed at causing disaffection from the union or indicating that, in raising the majority issue, the employer was merely seeking to gain time in which to undermine the union" (Appendix A pp. 25-26). No such allegation was ever made by pleadings or before the Trial Examiner. The disputed issue before the Trial Examiner was legal not factual.

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9. There is no evidence here that the certified Union's majority was dissipated by Petitioner's conduct. The Record indicates that, by its unjustifiable and *lost* strike, the certified Union had dissipated its own strength. The election petition and the facts on which that petition was predicated were a *result* and not a *cause* of the loss of majority status by the certified Union (26a). This is not a case of allowing employers to rely on employees' rights in refusing to bargain with the formally designated union.[1] This is a case where the employer, having been misled by frequent statements in Board and Court decisions that there was an "unusual circumstances" rule, asked for an investigation or hearing under that rule and under Section 9(c)(1) and was denied it; and then was subsequently charged with an unfair labor practice for acting neutrally while invoking the rule, and while urging an election permitted by Section 9(c)(3).

10. Both Respondent and the Court below have left unsettled the length of the remaining period of the certification. Is Petitioner to be given credit for the concededly lawful relationship from the date of certification to February 15th, 1952? One could understand a rule which held that Employer, having used up some of the certification year by litigating an unsuccessful election petition should make good that loss by adding an equal amount of time to the end of the certification year (*Semi-Steel Castings Co.*, 88 N. L. R. B. 609, 610; N. L. R. B., *Fifteenth Annual Report*, 1950, Govt. Print. Off. 1951, p. 74). It might well be that the Board's view (that the year's period should run from the date of certification rather than the date of election) would ordinarily be within the allowable area of the Board's discretion in carrying out Congressional policy *where there is no long delay in disposing of post-election objections and where there is no problem of a rival union.*

11. During the pendency of the election petitions, Petitioner could not know how the Board would decide them, and could not rule out the possibility of an election based on Section 9(c)(3) and "unusual circumstances". It would have been a breach of neutrality for Petitioner to negotiate with any union while there was a fair likelihood of an election (*Midwest Piping & Supply Co., Inc.*, 63 N. L. R. B. 1060; *Flotill Products, Inc.*, 70 N. L. R. B. 119). When two rival unions simultaneously organize a bargaining unit, an employer runs risk of unfair practice if he breaches neutrality by negotiating with either (*Union Carbide & Carbon Corp.*, 100 N. L. R. B. 689). Employer impartiality would on principle seem to be required before an *election* whether or not one of the unions had been previously certified. It is the election, not the previous certification, which needs impartiality. Nor, on principle, should a previous certification dispense with the need for neutrality. Petitioner, following the advice of its attorneys, in violation of no authoritative precedent, pursuant to Board rules in analogous cases and in the interest of neutrality, refused during the pendency of election petitions to deal with either union. The decision below now penalizes Petitioner for having striven to be impartial *vis-à-vis* two competing unions. If impartiality and neutrality are virtues and duties where rival unions, neither of which is certified, face an election, it is hard to understand why such neutrality and impartiality are not virtues and duties where one of the unions has been certified but where, due to "unusual circumstances", an election within the certification year but after the election year is in order. Where elections involving antagonistic unions impend, this Court should not permit two standards of employer impartiality—one for certified and the other for uncertified unions. If there is a new election, the earlier certification should not confer special status or privileges on one of the rival unions. This involves an important principle (which the Board compromises) having significance far beyond the issues and parties in this case. Free elections are a keystone of the statu-

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tory plan for industrial democracy. Respondent apparently believes in free and fair elections for uncertified unions, but not for rivals, one of which is certified. Nor should an employer petitioning for election be asked to act as if his petition were without merit. Employers should not be punished for acting consistently with a conviction that their election petitions are valid.

12. Both Respondent's Decision and that of the Court below (Appendix A p. 21) make much of the fact that, while a complaint (Case No. 2—CA-2554) was pending and untried, Petitioner proceeded according to its own conviction. If the time comes when, under our Constitution, citizens and subjects must defer to mere complaints, untried, unproved and denied, our liberties will depend on the whims or interests of complainants. It is disturbing that such a strange principle of duty under the Act should have constituted even part of the motivation for the decisions below. Petitioner's guilt, on the theory of the decision below, is augmented by a presumption in favor of the then pending, denied and untried complaint. To state such an argument against Petitioner is an affront to substantive due process.

CONCLUSION

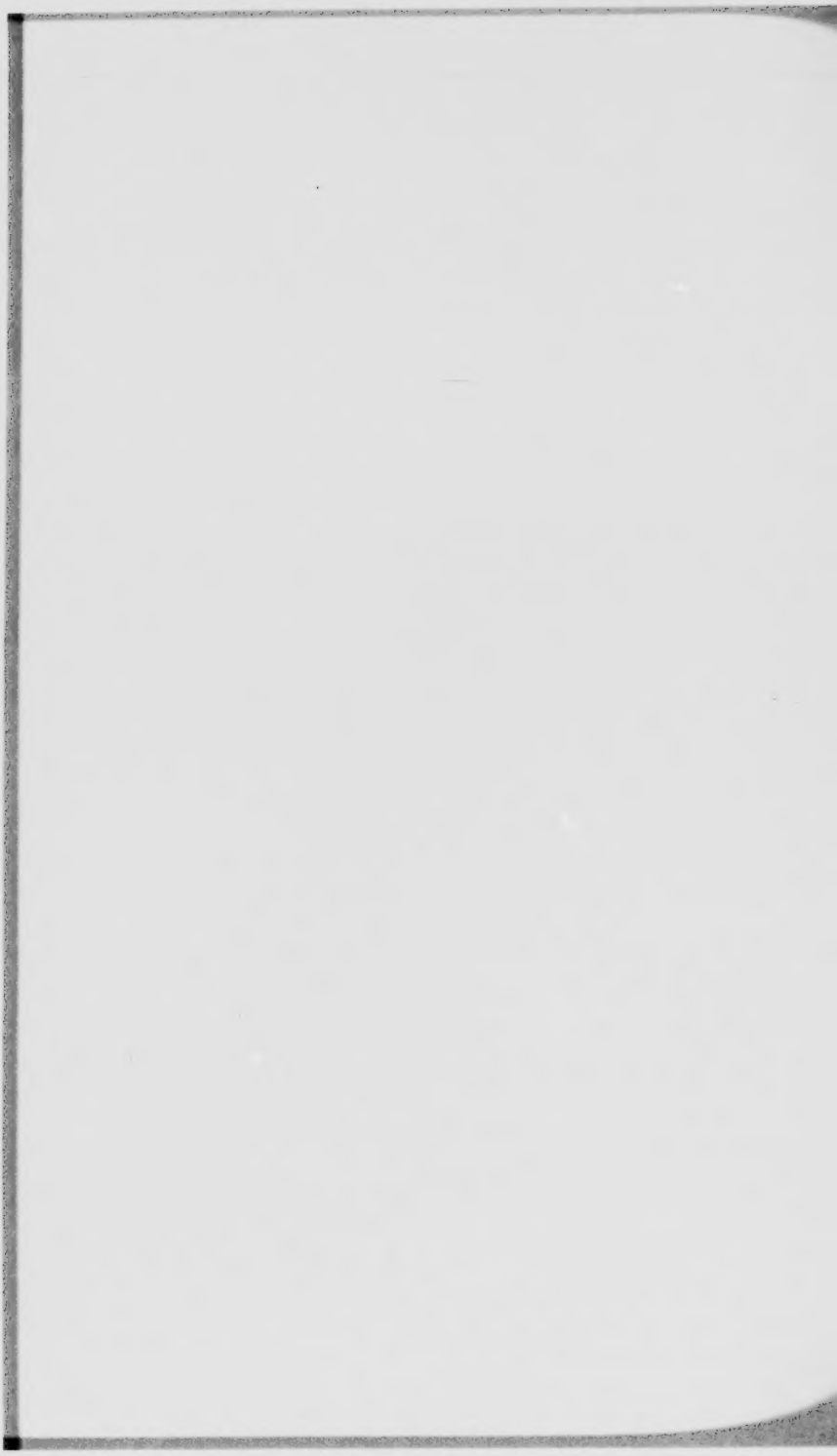
For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, N. Y., April 19, 1955.

Respectfully submitted,

GODFREY P. SCHMIDT,
Attorney for Petitioner.

THEODORE KIENDL,
WILLIAM R. MEAGHER,
RUFUS D. MCDONALD,
of Counsel.



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APPENDIX A

(Opinion of United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 66 October Term, 1954

Argued October 5, 1954 Decided January 19, 1955

Docket No. 23078

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HENRY HEIDE, INC.,
Respondent.

Before:

CLARK, *Chief Judge*, and L. HAND and FRANK, *Circuit Judges*.

Petition for enforcement of an order of the National Labor Relations Board. Granted.

SCHMIDT, EGAN, KENNY, SMITH & MURRAY (GODFREY P. SCHMIDT, of counsel), for respondent.

GEORGE J. BOTT, DAVID P. FINDLING, A. NORMAN SOMERS, FREDERICK U. REEL and ROSANNA A. BLAKE, for National Labor Relations Board.

The Board's decision and order, including its findings, are reported in 107 N. L. R. B. 258.

Appendix A

FRANK, *Circuit Judge*:

In November, 1945, Local 50 was certified by the Board as the exclusive bargaining representative of respondent's employees in an appropriate unit. Thereafter, respondent and that Union entered into a series of collective bargaining agreements, the last of which was executed in July 1950, and by its terms expired on May 15, 1951. In February 1951, the Union suggested that the parties enter into negotiations toward a new contract, but on April 12, before any agreement was reached, a rival union, Local 452, filed a representation petition with the Board. The Board conducted an election on May 17 which was won by Local 50. The defeated union, Local 452, thereupon filed objections to the conduct of the election. On October 9, 1951, the Regional Director issued his report finding no merit in the objections and thereupon certified Local 50 as the exclusive bargaining representative of respondent's employees. At that time a strike, theretofore called by Local 50, was in progress. During October 1951, the Respondent and Local 50 held several bargaining meetings, but reached no agreement on a contract, and Local 50's contract demands became one of the strike issues. During November, the parties met with representatives of the New York State Mediation Board, but were unable to settle their differences. Thereafter they met with an arbitrator.[*] As a result, a strike settlement agreement was signed on January 31, 1952.[*] In February the parties resumed negotiations for a contract, and agreed on some minor provisions.

On February 15, Local 452 notified the Respondent that it claimed to represent a majority of the employees in the unit and intended to file a petition. The Respondent notified Local 50 of this claim, and stated that it doubted

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[* Erroneous: The date was January 3, 1952 and Father Carey was *mediator* not arbitrator. Local 50 constantly refused arbitration.]

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Local 50's majority. Representatives of the Respondent and Local 50 then consulted the Regional Office of the Board as to their rights and duties, and were advised by a Board agent that the Respondent should continue to bargain with Local 50, as the "certification year" had not expired.

On February 19, both the Respondent and Local 452 filed petitions with the Board. On March 6, the Regional Director dismissed the petitions as prematurely filed in relation to the certification year, and on April 2 the Board, on appeal, sustained the Regional Director's rulings. On April 4, Local 452 filed a decertification petition. On April 17, the Regional Director dismissed this petition also as untimely, and on May 14, the Board sustained his ruling. During the pendency of these petitions before the Regional Director and the Board, the Respondent admittedly refused to bargain with Local 50.

On these facts, the Board concluded that the respondent-employer had violated Section 8(a)(5) of the Act by refusing to bargain with Local 50 four months after it had been certified. The Board rejected respondent's contention that it was justified in refusing to bargain pending final disposition of various petitions before the Board.

1. We think the Board's finding of these facts was supported by the "record as a whole"; and we hold that, on those findings, the Board reached the correct legal conclusion.

Respondent points to a doctrine originating with the Board that although an employer must bargain with a certified unit for a reasonable period, normally one year, he is relieved from that obligation if "unusual circumstances" are present.[1] All of the Board's "unusual circumstances"

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[1] N. L. R. B. 11th Annual Report, p. 43 (1946). See cases cited in footnote 2.

cases antedated the Taft-Hartley Act.[2] The language of that Act,[3] the failure of the Board to find "unusual circumstances" in any case since enactment of the Act,[4] and the recent authoritative interpretation by the Supreme Court of the Board's policy,[5] all suggest that an employer, acting on his own volition, may not, within the certification period, cease to bargain with a certified union because of "unusual circumstances": "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit." Brooks vs. Labor Board,

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[2] The Board has departed from the one-year certification period in the following instances:

(a) where the very identity of the certified bargaining unit was in doubt because of shifts in affiliation resulting from a schism. Brightwater Paper Co., 54 N. L. R. B. 1102 (1942); Carson Pirie Scott, 69 N. L. R. B. 935 (1946); Jasper Wood Products, 72 N. L. R. B. 1306 (1947).

(b) where the certified bargaining unit no longer exists or is inactive. Public Service Electric & Gas Co., 59 N. L. R. B. 325 (1944); Nashville Bridge Co., 49 N. L. R. B. 629 (1943).

(c) where the size of the bargaining unit was expected to alter drastically. Celanese Corporation of America, 38 N. L. R. B. (1942).

[3] "No election shall be directed in any bargaining unit or subdivision within which, in the preceding twelve-month period, a valid election shall be held." 29 U. S. C. Sec. 159(c)(3).

[4] The Board has, however, continued to pay lip service to the "unusual circumstances" qualification. See Lift Trucks, Inc., 75 N. L. R. B. 998, 999 (1948); Mengel Company, 80 N. L. R. B. 705, 719 et seq. (1948); Belden Brick Co., 83 N. L. R. B. 465, 466 (1949); Arthur A. Borchert d/b/a West Fork Cut Glass Company, 90 N. L. R. B. 944, 945-946 (1950).

[5] Brooks v. N. L. R. B. —— U. S. —— (December 6, 1954).

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—— U. S. —— (December 6, 1954). And here the Board has found—and its finding is supported by the record as a whole—that no unusual circumstances exist to warrant unilateral discontinuance of bargaining by the employer.

2. The Board also held that the following facts, as found by the Board—these findings being sufficiently supported by the record as a whole—constituted a violation of Section 8(a)(5): "On October 10, 1952, the Respondent, by letter, notified Local 50 that it was terminating recognition because the certification year had expired and it doubted Local 50's majority. Thereafter, Local 452 demanded recognition and threatened economic sanctions unless it was granted. The Respondent notified Local 50 of this demand, stated that it had decided to recognize whichever union could show to some impartial third party pledge cards indicating majority support, and invited Local 50 to participate in the card check. Local 50 refused on the ground that its certification required the Respondent to recognize and bargain with it. The Respondent then arranged for a card check, which was conducted on December 10. Local 50 did not participate. The results showed that Local 452 held applications of 216 of the 361 employees in the unit. On January 7, 1953, the Respondent entered into a maintenance-of-membership agreement with Local 452." The Board said that this termination of recognition of Local 50 at the end of the "certification year" would have been justified, if respondent in good faith had doubted that union's majority position. But the Board stated that, as it had held in a previous case, one of the essential prerequisites to a finding "that the employer raised the majority issue in good faith is that it must *not* have been raised in a context of illegal anti-union activity or other conduct by the employer aimed at causing disaffection from the union or indicating that, in raising the majority issue, the employer was merely seeking to gain time in

which to undermine the union." The Board added: "In this case, as we have found above, the Respondent, during the certification year, had violated Section 8(a)(5), and a charge alleging that violation was then pending before the Board. Under these circumstances, the Respondent could not lawfully refuse to bargain with Local 50 until the issue had been decided by the Board. The Respondent's termination of recognition of Local 50 and its subsequent recognition of Local 452 therefore constituted a violation of Section 8(a)(5)."[6] We agree with the Board.

3. We think the Board correctly held that the respondent violated Section 8(c)(1), (2) and (3), by granting exclusive recognition to Local 452 and by entering into the contract with that union.[7]

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[6] See also the portion of the Board's decision quoted *infra*, in point 4 of this opinion.

[7] The Board said: "The Trial Examiner also found that, by granting exclusive recognition to Local 452 and entering into a union-shop agreement with it, the Respondent violated Section 8(a)(2) of the Act. The record shows that the agreement did not in fact provide for a union shop, but for maintenance of membership. However, at the time of the execution of the contract on January 7, 1953, Local 50, as found above, was still the statutory representative of the Respondent's employees, and the Respondent was therefore under a duty to deal exclusively with it. Under these circumstancs, the execution of a contract with Local 452, granting it exclusive recognition, constituted unlawful support to that organization. The inclusion in the contract of a provision requiring members of Local 452 to retain their membership as a condition of employment clearly rendered that support more potent. Moreover, even if Local 50 had not been the statutory representative, the Board holds that an employer confronted with claims to recognition by rival unions violates Section 8(a)(2) if he recognizes one of them on the basis of a card showing. Accordingly, we agree with the Trial Examiner that the Respondent assisted and supported Local 452, in violation of Section 8(a)(2) and (1) of the Act. We also agree with the Trial Examiner that by executing the agreement of January 7, 1953, with

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4. The Board made the following findings of facts[8] which are supported by the record as a whole: "On May 28, 1952, after the Board had sustained the Regional Director's dismissal of Local 452's decertification petition, the parties again met. At this time, the Respondent expressed doubt of Local 50's majority and its belief that the employees had joined Local 452, and announced that, under these circumstances, it would not execute any agreement for a term beyond October 9, 1952, the end of Local 50's certification year. When Local 50, which had proposed a 2-year term, refused to accept this limitation, the Respondent declared that a stalemate had been reached. On the following day, Local 50 requested another meeting. The Respondent refused, saying that a deadlock had been created by Local 50's 'manifestly unalterable decision to insist upon a two-year contract and (the Respondent's) equally firm decision to reject a contract which goes beyond October 9, 1952,' and that, while that deadlock lasted, it saw 'no useful purpose that could be served by further meetings.' Local 50 replied that it had made no 'unalterable decision to insist upon a two year contract,' that its proposal was 'subject to discussion, alteration and modification,' and that the matter was 'subject to negotiation and

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Local 452 the Respondent violated Section 8(a)(3) of the Act. As noted above, the contract provided in part for maintenance of membership in Local 452 as a condition of employment. Such a provision clearly encourages membership in other labor organizations, and is lawful under Section 8(a)(3) only if, among other things, the contract is made with the duly designated representative of the employees. As Local 452 was not the representative of the Respondent's employees at the time the agreement was made, the execution of the contract providing for maintenance of membership in Local 452 constituted a violation of Section 8(a)(3)."

[8] More detailed findings on this score appear in the Trial Examiner's Intermediate Report. The Board adopted those findings.

contingent upon agreement on more important matters of collective bargaining.' The Respondent replied that it would resume negotiations only if Local 50 was willing, among other things, to negotiate a contract ending on October 9, 1952."

The Board concluded that, in this respect, respondent further violated Section 8(a)(5). The Board said that an employer does not act unlawfully in insisting on a contract limited to the "certification year," provided the employer does so in good faith and for no unlawful purpose. But the Board found a lack of good faith on respondent's part. If this finding rested exclusively on respondent's adamant refusal to bargain on this single item, we would hold that the Board erred. See N. L. R. B. v. American Insurance Co., 343 U. S. 395, 405. But that refusal was not an isolated fact. The Board could properly view that fact in its context.[9] Just as one may interpret Act Two of a drama in the light of Acts One and Three, so the Board, taking into account all respondent's behavior with reference to Local 50, including what respondent did before and after this refusal, could reasonably find an absence of good faith. And the following statement, contained in the Board's opinion, persuades us that such was the basis of its finding. "On the record as a whole we are convinced that the Respondent, on and after February 19, 1952, had no intention of honoring Local 50's certification, but was merely attempting to delay reaching any agreement during the certification year, in the belief that at the end of the year it could terminate recognition. In so finding, we rely on the Respondent's entire course of conduct, including its refusal to bargain while petitions were pending, its insistence on

[9] Cf. N. L. R. B. v. National Shoes, 208 F. (2d) 688, 692 (C. A. 2).

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limiting the term of the contract to the certification year as a condition of bargaining, its termination of recognition of Local 50 immediately upon expiration of the certification year, and finally its recognition of Local 452 on the basis of a card check while a complaint alleging refusal to bargain with Local 50 was pending before the Board. We therefore find that at all times since February 19, 1952, the Respondent has refused to bargain in good faith with Local 50, in violation of Section 8(a)(5) of the Act." While we might not thus find, we cannot say that the Board, in so finding, proceeded on the basis of unreasonable inferences.

Enforcement granted.

L. HAND, Circuit Judge (concurring):

The Board's order directed Heide to stop (a) refusing to bargain with Local 50; (b) recognizing Local 452; (c) performing its agreement of January 1953 with Local 452, until the Board had certified it; (d) and (e) assisting or encouraging Local 452 or discouraging Local 50; and (f) interfering with its employees in their right to bargain collectively. The "Grounds" for these three directions were, (a) that Heide has refused to bargain with Local 50 during a period in 1952 when Local 452 and itself had filed petitions to disestablish Local 50; (b) that after these petitions had been dismissed as premature, in its dealings with Local 50 Heide in bad faith had refused to make any contract beyond the end of the certified year (Oct. 9, 1952); and (c) that it had refused to recognize Local 50 after that time. I am not satisfied with the reasons given by the Board for finding that Heide's refusal was in bad faith. The first reason is that it had refused to bargain with

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Local 50 during the pendency of its petition and Local 452's to revoke Local 50's certification. I can see no connection between that and its good faith in supposing that after Oct. 9, 1952, Local 50's right to bargain might have ended. Besides, it was a natural enough mistake to think that the pendency of the petitions tolled Local 50's authority. The second reason is even less plausible: i.e. that Heide conditioned "any further bargaining on Local 50's acceptance of that provision." It was no evidence of Heide's belief that Local 50 might have already ceased to represent the employees that it "adamantly" refused to make a contract which would go beyond the year. It is not bad faith to be inflexible in asserting your doubts. "Grounds" (a) and (c) of the Board's decision support all the provisions of its order; and I would enforce it in toto because of them, but of them alone.

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Appendix A

(Decree of United States Court of Appeals for the Second Circuit)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

HENRY HEIDE, INC.,

Respondent.

—o—

DECREE ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: CLARK, Chief Judge, and L. HAND and FRANK, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated February 18, 1954. The Court heard argument of respective counsel on October 5, 1954, and has considered the briefs and the transcript of record filed in this cause. On January 19, 1955, the Court, being fully advised in the premises, handed down its decision enforcing the said order. In conformity therewith it is hereby

ORDERED, ADJUDGED AND DECREED that the Respondent, Henry Heide, Inc., and its officers, agents, successors, and assigns, shall:

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1. Cease and desist from:

(a) Refusing to bargain collectively with Candy and Confectionery Union, Local 50, Retail Wholesale and Department Store Union, CIO, as the exclusive bargaining representative of its employees in the certified appropriate unit;

(b) Recognizing Candy and Confectionery Workers Union, Local 452, Bakery and Confectionery Workers International Union of America, AFL, as the exclusive representative of its employees for purposes of collective bargaining, unless and until Local 452 shall have been certified as such by the National Labor Relations Board;

(c) Giving effect to its agreement of January 7, 1953, with Local 452, or to any extension, renewal, modification, or supplement thereof, or to any superseding agreement with said labor organization, unless and until Local 452 shall have been certified by the National Labor Relations Board as the representative of the Respondent's employees, provided that the Respondent in complying herewith shall not be required to vary the wages, hours of employment, rates of pay, seniority, or other substantive features of the employment relationship established thereby;

(d) Assisting or supporting Local 452 or any other labor organization;

(e) Encouraging membership in Local 452 or discouraging membership in Local 50 except as may be permitted by an agreement valid under the provisions of the National Labor Relations Act, as amended;

(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist Local 50, or any other labor organization, to bargain collectively through

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representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act, as amended, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the National Labor Relations Act, as amended.

2. Take the following affirmative action which the National Labor Relations Board has found will effectuate the policies of the National Labor Relations Act, as amended:

(a) Withdraw and withhold all recognition from Local 452 as the exclusive representative of its employees for the purposes of collective bargaining unless and until said organizations shall have been certified by the National Labor Relations Board as the exclusive representative of its employees;

(b) Recognize and bargain collectively with Local 50 as the exclusive representative of the employees in the appropriate unit and if an understanding is reached, embody such understanding in a signed agreement;

(c) Post at its plant in New York, New York, copies of the notice attached hereto, marked Appendix A. Copies of said notice to be furnished by the Regional Director for the Second Region of the National Labor Relations Board (New York, N. Y.), shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree, what steps the Respondent has taken to comply herewith.

/s/ CHARLES E. CLARK,
Judge, United States Court of Appeals for the Second Circuit.

/s/ LEARNED HAND,
Judge, United States Court of Appeals for the Second Circuit.

Filed:

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECREE

of the United States Court of Appeals enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL bargain collectively with CANDY AND CONFECTIONERY UNION, LOCAL 50, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, CIO.

WE WILL NOT assist or contribute support to CANDY AND CONFECTIONERY WORKERS UNION LOCAL 452, BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, AFL.

WE WILL NOT recognize Local 452, AFL, as the representative of our employees unless and until such labor organization shall be certified by the National Labor Relations Board.

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Appendix A

WE WILL NOT encourage membership in Local 452 or discourage membership in Local 50. And our employees are not required to be members of Local 452.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist LOCAL 50, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the National Labor Relations Act, as amended.

All of our employees are free to become or remain members of Local 50 or any other labor organization.

HENRY HEIDE, INC.
(Employer)

By.....
(Representative) (Title)

Dated.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

(Applicable Sections of the National Labor Relations Act, as Amended, and Rules and Regulations of the National Labor Relations Board)

SECTIONS OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

"Section 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice), to require as a condition of employment, membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months

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received from the Board a notice of compliance with sections 9(f), (g), (h), and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership,

* * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question

arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any state or Territorial agency established to mediate and conciliate disputes within the state or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

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"The duties imposed upon employers, employees, and labor organizations by paragraphs (2) (3) and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

"Section 9. * * *

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> "(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> "(B) by an employer, alleging that one or more individuals or labor organizations have presented to

him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

"(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

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"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

* * *

"Section 10. * * *

"(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a) (1) or section 8(a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its find-

ings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant

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such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, §§ 346 and 347)."

* * *

Appendix B

RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD

"EXCEPTIONS TO THE RECORD AND PROCEEDING

SEC. 102.46 *Exceptions or supporting briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral arguments.*—(*a*) Within 20 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to section 102.45, any party may (in accordance with section 10(*c*) of the act and section 102.82 and section 102.83 of these rules) file with the Board in Washington, D. C., seven copies of a statement in writing setting forth exceptions to the intermediate report and recommended order or to any other part of the record or proceedings (including rulings upon all motions or objections), together with seven copies of a brief in support of said exceptions and immediately upon such filing copies shall be served on each of the other parties; and any party may, within the same period, file seven copies of a brief in support of the intermediate report and recommended order. Copies of such exceptions and briefs shall immediately be served on each of the other parties. Statements of exceptions and briefs shall designate by precise citation of *page and line* the portions of the record relied upon. Upon special leave of the Board, any party may file a reply brief upon such terms as the Board may impose. Requests for such leave or for extension of the time in which to file exceptions or briefs under authority of this section shall be in writing and copies thereof shall be immediately served on each of the other parties.

(*b*) No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceedings."

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APPENDIX C

(Conflicting Opinion)

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. GLOBE AUTOMATIC SPRINKLER COMPANY OF PENNSYLVANIA, Respondent, 199 F. 2nd 64 (3rd Circuit)

KALODNER, *Circuit Judge*:

The National Labor Relations Board has petitioned this court [1] to enforce its Order against the respondent, Globe Automatic Sprinkler Company of Pennsylvania [2] (hereinafter called "Globe"). Jurisdiction of the Board and of this court is conceded.

The issue presented by the petition is whether the Board properly determined that Globe violated Section 8(a)(5) and (1) of the Act when, as a consequence of the filing of a decertification petition by an employee, it suspended negotiations with the Union [3] three weeks prior to the expiration of the year following its certification as the statutory bargaining representative of Globe's employees.

There is no substantial dispute as to the facts. They appear in detail in the Board's Decision and Order in 95 N. L. R. B. 253. They may be summarized as follows:

On May 4, 1949, pursuant to the terms of a consent election agreement, an election was conducted under proper supervision among respondent's production, maintenance

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[1] Pursuant to Section 10(e) of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. A. § 151 et seq.

[2] The respondent, in its Philadelphia, Pennsylvania, plant, engages in the manufacture, sale and distribution of automatic sprinklers, in the course of which it concededly makes substantial out-of-state purchases and sales.

[3] District Lodge No. 1, International Association of Machinists.

and shipping employees, admittedly an appropriate bargaining unit, in order to determine whether they desired to be represented by District Lodge No. 1, International Association of Machinists (hereinafter called "Union"), for the purpose of collective bargaining.

As a result of this election, the Union was formally certified on May 25, 1949, as the statutory representative of respondent's employees in the appropriate unit above described. Globe's employees in the unit numbered between 25 and 40 persons, depending upon the volume of its business.

Following the Union's certification on May 25, 1949, Globe and the Union, on May 31, 1949, commenced contract negotiations which continued during the succeeding 11 months, until May 4, 1950. With respect to these negotiations, it may be noted parenthetically, that while the Trial Examiner found that Globe during their course failed to bargain in good faith with the Union, the Board specifically concluded in its Decision and Order that it was not in agreement with that finding. The record discloses that although the negotiations were subjected to protracted delays, they were incident to and characteristic of the normal bargaining processes.

On May 1, 1950, (three days before the suspension of negotiations) a decertification petition was filed by one of Globe's employees and on the same day Globe was notified of that fact by an attorney for the petitioning employee with the accompanying statement, in writing, that he represented a majority of its employees and that he had filed the petition for decertification in their behalf. The attorney further requested Globe not to enter into any agreement with the Union until the Board had acted upon the petition for decertification. Globe thereupon broke off negotiations with the Union, assigning as its reason the

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filing of the decertification petition and the request of its employees to do so.

On May 5, 1950, an amended petition for decertification was filed with the Board signed by every employee in the bargaining unit. The amended petition was subsequently dismissed by the Regional Director of the Board on the ground that its filing was untimely. Subsequent to this dismissal, a second decertification petition was filed on October 11, 1950, likewise signed by every member of the bargaining unit. That petition was dismissed because of the pendency of the Board's proceeding against Globe for its alleged violation of Section 8(a)(5) and (1) in suspending negotiations with the Union on May 4, 1950.

It is conceded that the filing of the decertification petitions by the employees was entirely of their own volition; that they were not coerced or influenced by Globe and that the latter was not guilty of any proscribed activities or unfair labor practices in connection therewith.

On the facts stated, the Board concluded that the filing of the decertification petition did not relieve Globe of its obligation to recognize and bargain with the Union as the exclusive representative of the employees for a period of at least one year following the Union's certification to the Board and accordingly held that Globe's refusal to bargain with the Union *on and after May 4, 1950,* was in violation of Section 8(a)(5) and (1) of the Act. It then issued the usual remedial order requiring Globe (1) to cease and desist from refusing to bargain with the Union; (2) to bargain with the Union; and (3) to post the usual notices of compliance. Globe refused to comply and the Board thereupon filed the petition for enforcement of the Order now under consideration.

The Board takes the position that when, pursuant to Section 9(c)(1) of the Act, it certifies that a union has been

selected as their bargaining representative by the majority of the employees in an appropriate unit, the union acquires an exclusive and statutorily protected right to bargain with the employer on behalf of all the employees in the unit with respect to terms and conditions of employment and that such right inures to the union for at least one year following its certification. Accordingly, it contends that Globe's breaking-off of negotiations three weeks prior to the expiration of one year from the Union's certification constituted a violation of its so-called one-year rule with respect to certifications.

It is conceded by the Board that the Act does not specify the length of time the union is entitled to enjoy an exclusive status without being required to meet a claim that changed circumstances have resulted in a loss of its majority support. It asserts, however, that in administering the representation features of the Act it was faced at the outset with the problem of striking an accommodation between two basic aims of the Act: one, to provide employees with a real opportunity freely to select their bargaining representative; the other to provide the bargaining relationship, once established, with a reasonable degree of stability, and it has found that in the ordinary case one year of immunity to attack upon its majority status affords a certified union the required reasonable period of protection in which to attempt to negotiate a contract with the employer. That, says the Board, is the basis for its rule that in "the absence of unusual circumstances"[4] a "union's representative status is *conclusively* presumed for *at least one year* following certification."[5] The rule is enforced, the Board states, even where there has been a loss of the union's

[4] Lift Trucks, Inc., 75 N. L. R. B. 998, 999-1001.

[5] Jersey City Welding & Machine Works, Inc., 92 N. L. R. B. 510, 511.

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majority during the year period [6] and during that time it will not entertain either a new petition for certification of representatives or a petition for decertification of the incumbent union.

Failure or refusal of an employer to bargain with a union for "at least one year" following its certification constitutes an unfair labor practice, says the Board, even though, as in the instant case (1) the union has lost every one of its members; (2) such loss of membership cannot be attributed to any activities, proscribed or otherwise, of the employer; and (3) the employer has, in good faith and in accordance with every requirement of the Act, bargained with the union prior to the loss of its membership. The Board contends that both its "one-year rule" and its application along the lines stated have been accorded judicial sanction. It says we approved its rule "in principle" in National Labor Relations Board v. Swift & Co., 3 Cir., 1947, 162 F. 2d 575, 584-585, certiorari denied 332 U. S. 791, 68 S. Ct. 101, 92 L. Ed. 373.

On that score it need only be said that in the Swift case the union's loss of majority status was due to the fact that the employer had failed to bargain for an unbroken period of approximately two years after the certification of the union. The situation and questions involved in the Swift case were not similar in any respects to the situation and issue here involved. The same may be said of the other cases cited by the Board. For example, in National Labor Relations Board v. Appalachian Electric Power Co., 4 Cir., 1944, 140 F. 2d 217, 222, in less than ten weeks after the union's certification, a non-supervisory employee obtained signatures of a large majority of the employees to a petition that they no longer desired to be affiliated with the union and, as a consequence, the employer refused to con-

[6] Arthur A. Borchert, d/b/a West Fork Cut Glass Co., 90 N. L. R. B. 944, 945.

tinue to bargain with the union. The court ruled that "The Board, therefore, properly held that a *reasonable time* had not elapsed since the election and certification, and that the certification still remained in full force and effect, *under the circumstances of the instant case.*" (emphasis supplied). Similarly, in National Labor Relations Board v. Century Oxford Mfg. Corporation, 2 Cir., 1944, 140 F. 2d 541, certiorari denied 323 U. S. 714, 65 S. Ct. 40, 89 L. Ed. 574, in less than six weeks after certification the employees almost unanimously presented a petition repudiating the union and the employer thereupon suspended negotiations with the union. The court, citing the Appalachian Electric Power Company case, held that a reasonable time had not elapsed since the election and certification.

In National Labor Relations Board v. Botany Worsted Mills, 3 Cir., 1943, 133 F. 2d 876, a majority of the employees repudiated the union exactly one week after the election and before certification, and the employer refused to bargain as a result. No request was made by the employees for another election. We there sustained the Board. It is pertinent to note that in doing so we stated, 133 F. 2d at page 882, "The employees in this case, if they wished to change their minds concerning a bargaining agent, could have asked the Board for another election. If the Board had arbitrarily refused it within a reasonable time then we might have a case where a question could be raised whether it had done its duty under the statute." That observation is significant in the light of the fact that in the instant case the members of the Union unanimously petitioned the Board for decertification and the petition was arbitrarily dismissed.

Further detailed consideration of the factual situation in a number of other cases cited by the Board would serve no useful purpose inasmuch as none of them are analogous,

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even in their broadest aspect, to the situation here involved.[7]

Nor is it necessary to dwell upon the Board's contention that its "one-year rule", as presently urged, has been accorded judicial or legislative approval. The crux of the contention as to legislative approval, is that the one-year certification rule "was well known to Congress prior to the 1947 amendments of the Act, and Congress in part codified the rule when it enacted Section 9(c)(3) of the amended

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[7] In Southern Block and Pipe Corporation, 90 N. L. R. B. 590 (1950), the union was certified on December 11, 1947. There were on-an-off negotiations between the union and the employer which culminated in an apparent agreement early in November, 1948, at which time the union approved the contract, with changes earlier proposed by the employer, and submitted it to its negotiating officers. The latter, on December 1, 1948, decided to hold in abeyance the union-approved contract and not sign it pending the outcome of decertification proceedings. The latter were not filed until December 16, 1948, more than one year *after* the union's certification. The Board stated as a fact that the employer had "* * * contributed to producing the very situation which it urges as reason for its refusal to bargain by assisting in the preparation and filing of the decertification petition" and accordingly, under the circumstances, was in violation of Section 8(a)(1) of the Act because of its interference, restraint and coercion of its employees in the exercise of their rights as guaranteed in Section 7 of the Act.

It is apparent that the Southern Block and Pipe Corporation case affords no precedent for the Board's decision in the instant case, inasmuch as in the latter (1) the decertification petition was filed by the members of the union before the expiration of the year of certification; and (2) the employer has in no way contributed to the filing of the decertification petition.

In National Labor Relations Board v. Worcester Woolen Mills Corporation, 1 Cir., 1948, 170 F. 2d 13, the employer never bargained with the union, questioning instead the validity of its certification. The same situation prevailed in National Labor Relations Board v. S. H. Kress & Co., 6 Cir., 1952, 194 F. 2d 444.

Act which proscribed the holding of more than one valid *election* in a bargaining unit during any 12 month period."[8] (emphasis supplied).

As to the asserted Congressional approval of the one-year rule, it is well-settled that Congress could not be presumed to adopt an administrative construction unless it is clear, uniform and consistent and there exists "the precise conditions passed on prior to the re-enactment", U. S. v. Missouri Pacific Railroad Company, 1929, 278 U. S. 269, 280, 49 S. Ct. 133, 137, 73 L. Ed. 322. The same principle applies with respect to the courts. "The court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons." Burnet v. Chicago Portrait Co., 1932, 285 U. S. 1, 16, 52 S. Ct. 275, 281, 76 L. Ed. 587; see also Estate of Sanford v. Commissioner, 1939, 308 U. S. 39, 60 S. Ct. 51, 84 L. Ed. 20.

Indeed, in the Mengel Company, 80 N. L. R. B. 705, 719 (1948), the Board conceded that "none of the precedents cited, it is true, have ever defined in absolute terms the length of the 'reasonable' period within which the agency 'certification' must be given effect." The Mengel decision, it may be noted, was subsequent to the 1947 amendments to the Act.

It is readily apparent from an examination of its own decisions in prior cases that even the Board has not been too specific or definitive in its statement of the one-year certification rule. In the instant case it takes the position that the one-year rule is as inflexible, unyielding and immutable as the law of the Medes and Persians and that it has the rigidity of a statute of limitation or a statute defining jurisdiction. It took the same position in Southern

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[8] Section 9(c)(3), in pertinent part, reads as follows: "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

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Block and Pipe Corporation, 90 N. L. R. B. 590, 591 (1950) where it held "* * * an employer is obligated to bargain with a certified union *during* the certification year." (emphasis supplied).

However, in Lift Trucks, Inc., 75 N. L. R. B. 998 (1948), the Board stated its rule as follows (p. 999):

> "An employer is obligated to bargain with a certified union *for a reasonable period of time.* In the *absence of unusual circumstances,* a reasonable period of time is *customarily* held to be one year." (emphasis supplied).

Again in The Belden Brick Co., 83 N. L. R. B. 465 (1949), the Board stated (pp. 465-66):

> "The Board and the courts have frequently held that an employer is obligated to bargain with a certified union for *a reasonable period of time, customarily* for 1 year after certification. Hence, a petition for decertification filed during the year following certification of the incumbent union does not, *except under unusual circumstances which are not present here,* create a question concerning representation so as to relieve the employer of the obligation to bargain with the certified union." (emphasis supplied).

Analysis of judicial interpretations of the one-year rule discloses that the courts have never indicated approval of a rigid limitation such as is urged in the instant case. As previously pointed out, the Court of Appeals for the Fourth Circuit in National Labor Relations Board v. Appalachian Electric Power Co., supra, stated the rule to be, 140 F. 2d at page 221:

> "*The operative life of a certification should be at least a reasonable time, dependent upon the circumstances of the individual case.*" (emphasis supplied).

Appendix C

In National Labor Relations Board v. Geraldine Novelty Company, 2 Cir., 1949, 173 F. 2d 14, 16-17, the court in speaking of the one-year rule said:

> "Such period of stability *usually extends for about a year* in the case of a certified union without a contract. * * *" (emphasis supplied).

The Supreme Court of the United States has never passed upon the one-year certification rule. However, in Franks Bros. Co. v. National Labor Relations Board, 1944, 321 U. S. 702, 64 S. Ct. 817, 88 L. Ed. 1020, in holding that the Board had acted within its statutory authority, in ordering the employer to bargain collectively with a union which had lost its majority after the employer had wrongfully refused to bargain with it, the court stated, 321 U. S. at page 705, 64 S. Ct. at page 819:

> "* * * a bargaining relationship once rightfully established must be permitted to exist and function *for a reasonable period* in which it can be given a fair chance to succeed." (emphasis supplied).

In sum, it is apparent that the overwhelming weight of authority [9] expressed in decisions by the National Labor

[9] Exceptions are the National Labor Relations Board v. Vulcan Forging Co., 6 Cir., 1951, 188 F. 2d 927, 930-31, where the court held that the employees' unanimous repudiation of the union less than six weeks after its certification, terminated the union's representative status; and National Labor Relations Board v. Inter-City Advertising Co., 4 Cir., 1946, 154 F. 2d 244, where it was held that when a union majority has been dissipated without fault on the part of the employer, the union no longer possessed the authority to speak for the employees and an order of the Board that required the employer to bargain with the union cannot be enforced. We expressed disagreement with the holding in the Inter-City case in National Labor Relations Board v. Swift & Co., 3 Cir., 1947, 162 F. 2d 575, 584.

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Relations Board and by the courts, is (1) that "in the absence of unusual circumstances" a "reasonable period" must elapse after the certification of the union before the employer can refuse to bargain with it; and (2) "reasonable period" has been defined as "customarily" or "usually" for "about one year".[10]

It may be noted that the Board recognized the existence of "unusual circumstances" in a number of cases, among them Carson Pirie Scott & Company, 69 N. L. R. B. 935 (1946) and Jasper Wood Products Company, Inc., 72 N. L. R. B. 1306 (1947). In both cases the unions, well within a year of their certification, switched their affiliation from the Congress of Industrial Organizations (CIO) to the American Federation of Labor. The Board held in each instance that new elections must be held and that the one-year rule asserted by the CIO was inoperative because of the existence of "unusual circumstances". It is difficult to rationalize the ruling in these cases with the attitude of the Board in the instant case.

The only apparent distinction is that here the members of the union unanimously repudiated the certified union without affiliating with a new union, as was done in the Carson Pirie Scott and Jasper Wood Products cases. We can only say that it is a distinction without a difference.

We approach the problem presented by the Board's petition for enforcement with the well-settled rule in mind

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[10] The leading National Labor Relations Board case on the subject, Matter of Kimberly-Clark Corp., 61 N. L. R. B. 90, 92 (1945), discussed the one-year rule in the following terms:

"We have consistently held, both in unfair labor practice cases involving Section 8(5) of the Act, and in cases arising under Section 9(c), that a Board election and certification must be treated as identifying the statutory bargaining agent with certainty and finality for a reasonable period of time—about a year, under ordinary circumstances."

that "The powers conferred upon this court by the National Labor Relations Act to enforce the orders of the Board are equitable in nature and may be invoked only if the relief sought is consistent with the principles of equity." National Labor Relations Board v. National Biscuit Co., 3 Cir., 1950, 185 F. 2d 123, 124.

The Board here seeks to impose sanctions upon an employer who bargained in undisputed good faith with the certified union for a period of eleven months and one week and who only terminated the bargaining process upon the written request of its employees, coincident with their unanimous action in filing a decertification petition which was not prompted or influenced by proscribed activities on the employer's part. The record, it may be noted, discloses that the dissatisfaction of the employees with the certified union was attributable to several facts—the union took the position that its business representative was authorized to enter into a collective bargaining agreement on behalf of its members without their ratification or their approval; the proposals and counter-proposals in the course of the almost year-long bargaining were never submitted to the employees; the latter were not kept advised of the course of negotiations and no formal meetings of the union were held.

In our opinion, it would be inconsistent with the principles of equity if, under the circumstances stated, we should grant the Board's petition for enforcement.

Further, to sustain the Board's position here would be violative of the spirit and the very letter of the National Labor Relations Act. The latter, in its declaration of policy, asserts that the purpose of the Act is to protect "* * * the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the

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terms and conditions of their employment or other mutual aid or protection." 29 U. S. C. A. §§ 151 et seq.

If the Board's petition for enforcement were sustained and the employer, in consonance with our order, would negotiate a contract with the union we would have a situation where the employees would be bound to work under terms and conditions fixed for them by representatives not of their own choosing. Such a situation would be intolerable no doubt to the employees, and certainly not conducive to the industrial repose sought by the Act. It would be in express violation of their lawful right under the Act to bargain collectively through a representative of their own choosing and to enjoy "full freedom of association, self-organization, and designation of representatives."

It is regrettable that in dealing with this situation the Board appears to have focused its attention solely upon the relationship, under the asserted one-year rule, between the employer and the certified union, and to have been oblivious of the lawful rights and interests of the vitally-concerned employees.

The conclusion is inescapable that the Board overlooked the salient consideration that the National Labor Relations Act was designed by the Congress to serve as a shield and not as a shackle to the millions of our employed whose welfare is the proper subject of national concern.

For the reasons stated the petition of the Board will be denied, and the Order of the Board will be set aside.

APPENDIX D

(Excerpts from Record, Demonstrating That No Actual Bad Faith of Petitioner Ever Became an Issue Below)

No issue outside the nine issues stated in the Intermediate Report (313)* was ever presented to the Trial Examiner.

Counsel for Petitioner adduced no testimonial evidence because the General Counsel had not made out a *prima facie* case on the specified nine issues (195a). After the trial, to add a tenth issue (which was never before raised) is to deprive Respondent of due process by belatedly holding Respondent to a *probandum* which did not exist as of the moment when the General Counsel's case was completed. Obviously, only a fool would refuse to produce testimonial evidence to refute a tenth issue involving his clients' actual *bona fides.*

1. *Transcript of the minutes of the trial before the Trial Examiner.*

(a) When the trial began, the General Counsel's representative, Mr. Goldstein, made it clear that there was no substantial question of disputed fact:

> "* * * Due to the voluminous number of exhibits which the Trial Examiner will have to review in deciding this matter, I am going to attempt to give a very brief statement of the facts * * *. Apparently, they are virtually undisputed" (120a).

If Employer's actual bad faith had been an issue Mr. Goldstein would not have talked about "virtually undisputed" facts. What was at issue was Employer's construc-

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* See footnote, *supra*, page 3.

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tive or legally implied bad faith in performing certain (admitted) acts.

(b) The only Board witness, Mr. Frank Scida, was asked whether Employer had ever refused to meet and to bargain except during the pendency of representation petitions and appeals from those petitions. Mr. Scida admitted that there was never a refusal except during those periods (101a). (See also 80a.)

(c) Mr. Goldstein made a statement in lieu of brief (120a, *ff.*).

> "Finally, sir, with respect to Section 8(a)(5), which is the heart of the case, there is no problem with respect to appropriate unit. * * * the General Counsel can see no real problem in this case respecting majority status. * * * If the General Counsel is in error, * * * then the question of actual majority status would be relevant" (130a).

The only issue which Board Counsel regarded as "the heart of the case" was the admitted refusal of the Employer, to bargain during the pendency of election proceedings.

(d) The following colloquy (143a) emphasizes the constructive nature of the alleged bad faith:

> "Mr. Schmidt: I am willing to take my adversary's statement as to what is the heart of the case, that is, the 8(a)(5) part; in that case, there is not, authoritatively, anything in the books like a one-year certification rule.
>
> "The way the authorities can be summarized is that there is indeed, in the absence of unusual circumstances, a reasonable period. * * *

> "Trial Examiner Winkler: This case is not a matter of bad faith in the actual sense; it is a word of art."

(e) After the General Counsel's case had been put in, Attorney for Employer said without being contradicted:

> " * * * I think the real question is whether or not there was the type of unusual circumstances in this case which the Board and the Courts have constantly referred to as the basis for not honoring the one-year certification rule. This is the real question * * *" (109a).

2. *The Intermediate Report.* The Trial Examiner had taken the untenable position that the very filing by Employer of an RM petition was an unfair labor practice. Therefore, when he concluded that, beginning on February 19th, 1952, the Employer had refused to bargain collectively, he was confining himself to the nine issues which he had formulated; and particularly to the issues which developed from the facts that Employer had on February 19, 1952 filed an RM petition and had refused to bargain during the pendency of RM, RC and RD petitions and appeals. The Trial Examiner's second conclusion of law states simply that Petitioner had refused to bargain. It does not say that it had bargained in bad faith.

3. *The Exceptions filed by the parties.* Both Respondent and Intervenor, Local 452 AFL, but neither General Counsel nor the complaining Union filed Exceptions to the Intermediate Report. Neither Respondent nor Intervenor in their Exceptions challenged the accuracy of the Trial Examiner's statements of issues. Therefore, under Section 102.46 of the Board's Rules and Regulations, Subdivision (b) no matter not included in a statement of excep-

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tions may thereafter be urged before the Board or in any further proceedings.

4. *Transcript of the minutes of hearing before the National Labor Relations Board at Washington.* On September 22nd, 1953, this case was argued before the National Labor Relations Board in Washington. The manner in which the opposing counsel and the Board itself framed the issues on that occasion demonstrates that they did not deviate from the nine issues listed by the Trial Examiner in his Intermediate Report:

(a) "I (Mr. Schmidt) filed fifteen specifications of those * * * when I filed the appeal to this Board. * * *

Chairman Farmer: I think that is a very crucial point.

Mr. Schmidt: I agree. I am bound in that respect by the specifications I made at the time of those fifteen points. I should be judged on those fifteen points.

Mr. Murdock: Do you say that this is the crucial issue in the case, whether or not you bring yourself within the rule of unusual circumstances.

Mr. Schmidt: That is one of the crucial issues in the case, unquestionably. There are others, as you will see if you consult Page 7 of the Intermediate Report where the Trial Examiner raises the contentions and begins the attempt at resolution of the issues" (157a).

(b) The Chairman of the Board said:

> "We have to determine whether or not the circumstances are such that a free election could be held."

(c) Leon Reich, attorney for the Complaining Union, bespoke his clear understanding of the real issues:

"* * * As I understand this case, Board's Counsel presented it on a theory that the documentary evidence *per se* and the undisputed facts as they exist on their face, without regard to whether there was good faith or bad faith, constitute a refusal to bargain. * * *

If I say that during that period I won't bargain with you, whether my motives are good, bad or indifferent, I am violating the law, the rule laid down by this Board * * * " (165a).

(d) "Mr. Murdock: I don't see how you can consistently take the position that the Respondent can be in good faith in bargaining at the same time it is filing petitions claiming a question of representation.

Mr. Reich: You are absolutely right" (167a).

(e) "Chairman Farmer: How does the one-year rule affect the disposition of this case?

Mr. Reich: The one-year rule affects the disposition in that if there were no one-year rule, the filing of the petitions in February might perhaps be deemed to be valid and Mr. Schmidt's refusal to bargain following those petitions might perhaps be understood" (173a).

(f) The oral argument of Board Attorney, Seymour Goldstein:

"* * * The General Counsel does not contend that the opinion (of Mr. Ritolo, the Regional Board Counsel) was binding. What he does contend and what the Trial Examiner found was a failure to follow that consultative opinion with some evidence, some indication of the Employer's bad faith in later refusing to bargain.

Chairman Farmer: I don't quite follow that. Not binding; but if he doesn't follow it, it is an indication of bad faith?

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Mr. Goldstein: If he does not follow the opinion, that, together with other things, may create a picture of bad faith. That alone *per se* would not be bad faith * * *" (175a).

"To General Counsel it appears clear that the prime principle of law involved is the certification year rule principle" (180a).

"Primarily, you have a flat refusal to bargain at the end of the fourth month of the certification year when the petitions were filed. (The reference is, of course, to the RM and RC petitions). That is the basic violation here. This refusal lasted for three months * * *.

"Secondly, you have the filing of the Employer's petition on February 19th, 1952. As to that, I believe it is probably a question of semantics as to whether that filing was one of bad faith or good faith. First of all, that filing would be a violation since it is part of the Employer's refusal to bargain. * * *

"If he files a petition, he is concomitantly moving at his peril. Whether he files a petition in good or bad faith is of no moment. The filing of the petition is part of the violation * * * " (182).

"* * * there can be no real question concerning representation during the certification year * * *.

"An employer cannot raise a question concerning representation by his petition or by anyone else's. Therefore, regardless of his underlying motive in filing the petition, he filed it at the wrong time * * *" (184a).

5. *The Board's Order and Decision.* Insofar as the Board's (Order and) Decision formally states the issues

(355), they are correctly stated. But the Board interpolates (371) a paragraph which interpolates a false issue.

There is nothing in the Record to suggest that the Respondent "on and after February 19th, 1952, had no intention of honoring Local 50's certification". On many occasions after February 19th, 1952 (to wit, April 8th, May 28th, August 1st and August 28th, 1952) Employer bargained collectively with Local 50. In intervening periods, it met often with Local 50 to adjust grievances. Nor is there one jot of evidence that Employer was "attempting to delay reaching an agreement during the certification year in the belief that at the end of the year it could terminate recognition". It is undisputed that Employer was ready to conclude a contract with a duration not to exceed the end of the certification year.

It is not without significance that when the Board attempted (355) to integrate the meaning of the words "entire course of conduct", it included a list of the very things which constituted the issues framed by the Trial Examiner. It seems likely that the Board, in speaking of the "entire course of conduct" which it added up to the alleged failure to bargain in good faith under 8(a)(5) of the Act, was using the words "good faith" constructively.

The most basic question was: "Did there exist unusual circumstances to warrant refusal to bargain during the certification year and the pendency of the representation proceedings?"

> "Trial Examiner: * * * Is it your position, assuming you are wrong about the proposition that majority status may not be attacked at all during the certification year, assuming you are wrong, then your whole cause falls here. Doesn't it?
>
> "Mr. Goldstein: I think that would be correct, yes" (138a). * * *

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Appendix D

"Mr. Goldstein: * * * I would agree with the Trial Examiner * * * that if the Vulcan Forge decision is correct, it would probably have a serious effect on the instant case, and the instant case would probably be found without merit * * *.

"Trial Examiner: * * * If the respondent is excused from bargaining with the union in this case during the certification year because of the various circumstances in the case, then there is no violation here at all; is that correct?

"Mr. Goldstein: That is right; * * *" (142a, 143a).

* * *

"Mr. Goldstein: * * * The real question concerning representation can be one only when there could be a doubt as to majority status.

Chairman Farmer: How does the Employer know when the petition is filed whether it is timely or not? It may be timely if we found during the certification year unusual circumstances.

Mr. Goldstein: To that extent he may move at his peril.

Chairman Farmer: Either way then?

Mr. Goldstein: Yes.

Chairman Farmer: It is a very awkward situation" (185a).